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CIVILITY AND PROFESSIONALISM – STANDARDS OF COURTESY

"The more I have to do with lawyers, the more I feel as if I had been compelled to take a voyage down a sewer in a glass-bottomed boat."

Thomas Wolfe (1900-1938), American novelist (Look Homeward, Angel), in a letter in 1937 to Maxwell Perkins, the renowned editor of Wolfe, Fitzgerald, Hemingway, and other writers.

Over the past few years the OLSC has become increasingly concerned about the number of complaints alleging rudeness and discourtesy by practitioners. The OLSC experience reveals that allegations of rudeness and bad manners result in numerous complaints to the Office despite there being a positive obligation on all practitioners in Australia to ensure that their communications are courteous and that each practitioner avoids offensive or provocative language or conduct. In the period between July 2000 and June 2006, for example, our office received 523 complaints alleging practitioner rudeness. The frequency of these complaints is constant and averages just under 90 complaints annually. Whilst many of the complaints we receive are between practitioners, a number of complaints concern practitioner/client or practitioner/third party. It is the allegations of rudeness by practitioners to clients and third parties that is the major cause for concern within the Office.

In New South Wales the obligation of courtesy is found in Rule 25 of the *New South Wales Revised Professional Conduct and Practice Rules (Practice Rules)*. Rule 25, states as follows:

"A practitioner, in all of the practitioner's dealings with other practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the practitioner's communications are courteous and that the practitioner avoids offensive or provocative language or conduct."

The Statement of Principles prefacing the section of the Rules dealing with Relations with Third Parties further states:

"Practitioners should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest."

In addition to the Conduct Rules, practitioners in New South Wales have a statutory obligation under clause 175 of the *Legal Profession Regulation 2005* to refrain from discriminatory or harassing behaviour. The same or similar practice rules as in New South Wales can be found in a number of other Australian jurisdictions.[1]

[1] **ACT** – Rule 25 of the Law Society of the Australian Capital Territory Professional Conduct Rules; **NT** – Rule 25 of the Law Society of the Northern Territory Rules of Professional Conduct and Practicer Rules; **QLD** – Solicitors' Handbook r 4.08 & 18.00; **SA** – Rule 21 of the Rules of Professional Conduct & Practice Rules; **WA** – Rule 18.1 of the Professional Conduct Rules; **VIC** – Rule 21 of the Professional Conduct and Practice Rules 2005.

CIVILITY AND PROFESSIONALISM – STANDARDS OF COURTESY

(CONTINUED)

There is no practice rule in New South Wales, unlike the practice rules in Queensland, that stipulates that a practitioner must ensure that their communications with their client or third party are courteous and do not involve offensive or provocative language or conduct.[2] However, I consider that practitioners are bound by obligations beyond the Act, the Regulations and the Rules and, in reality, the obligation to be civil and courteous is not just limited to fellow practitioners but extends to all members of the public irrespective of their professional status. The omission of such a rule does not automatically mean that there cannot be a disciplinary sanction against a practitioner where the complaint is made by someone other than a practitioner. However, difficulty will always be entailed in determining which language is "offensive" or "provocative" since one person's insult can be another's term of endearment.

Nonetheless, determinations in New South Wales in relation to allegations of discourtesy have set the hurdle at a particularly high level. There have only been three cases over the last forty years in which the disciplinary tribunal/committee has made adverse findings about the behaviour of a practitioner on grounds of discourtesy.

In the matter of *Constantine Karageorge* No. 12 of 1986, the Solicitors Statutory Committee was asked to consider whether six separate and unrelated complaints concerning conduct by Karageorge amounted to disgraceful or dishonourable conduct and if the conduct did amount to disgraceful and dishonourable conduct whether Karageorge was guilty of professional misconduct. The six counts included using offensive and racist language and threatening behaviour to members of the public and to other practitioners. The Committee found that the language used by Karageorge was grossly offensive and expressed the view that Karageorge's conduct was "disgraceful and dishonourable and amounted to professional misconduct." Karageorge was found guilty of professional misconduct by the Solicitors Statutory Commmitee and fined $5,000.

In the matter of *New South Wales Bar Association v Jobson* [2002] NSWADT 171, the conduct impugned was offensive language along with physical intimidation by a barrister towards a solicitor. The Tribunal was satisfied that the conduct amounted to unsatisfactory professional conduct and the barrister was publicly reprimanded.

In *New South Wales Bar Association v di Suvero* [2000] NSWADT 194 & 195, the conduct that was challenged included the barrister making statements that were discourteous to the court, disrespectful to the presiding judge and offensive to the Crown Prosecutor. A finding of unsatisfactory professional conduct was made and the barrister's practising certificate was suspended for 6 months. The Tribunal's decision was upheld on appeal.

In each of these three cases the conduct which was found to be offensive was largely conduct that occurred between a practitioner toward a fellow practitioner. Karageorge is the only matter in New South Wales where the practitioner was found guilty of professional misconduct for using offensive language to a third party. Although Karageorge maintained that he did not have a professional duty towards a member of the public who was not a client, the Statutory Committee thought otherwise, stating:

"If the Solicitor in pursuit of his profession deals with a member of the public he should do so in accordance with the profession's standards as to how its members should conduct themselves in such circumstances. It may be that the conduct complained of would amount to reprehensible rudeness or churlish discourtesy of it were conduct on the part of someone other than a solicitor. There may be some acts which, although they would be not be disgraceful in any other person, yet if they are done by a solicitor in relation to his profession may fairly be considered disgraceful and dishonourable conduct: see Lord Esher M.R. *in Allinson v General Counsel of Medical Education and Registration (1894) 1 Q.B. 750* at 760. Clearly such acts may include acts perpetrated towards members of the public."

The importance of maintaining civility amongst practitioners and between practitioners and clients is imperative. Cordial and courteous communications promote a good working environment to adjudicate disputes without tension and distress. A lack of civility diminishes public regard and may in turn reduce confidence in the judicial system.

The need for courteous communications has been recognised on numerous occasions by the courts, regulators and

[2] See Rule 18 of the Queensland Handbook.

academics both in Australia and overseas. According to the Chief Justice of New South Wales Jim Spigelman, 'civility' is recognised as a 'fundamental ethical obligation of a professional person'.[3] Similarly, in *Garrard v Email Furniture Pty Ltd* (1993) 32 NSWLR 662 at 667, Kirby ACJ remarked:

"Those members of the legal profession who seek to win a momentary advantage for their clients without observing the proper courtesies invite correction by the court and disapproval of their colleagues... To the extent that solicitors act in this way, they run the risk of destroying the confidence and mutual respect which generally distinguishes dealings between members of the legal profession from other dealings in the community."

However, despite the obvious benefits of civility to the legal profession, many avow that civility is anachronistic or incompatible with today 's commercial realities. According to this view law is a deemed 'business' and calls for ruthless competitiveness. Civility is however not inconsistent with representing a client diligently within the rules, and nor is it a sign of weakness. As the High Court stated in Clyne v *New South Wales Bar Association* (1960) 104 CLR 186;

"It is not merely the right but the duty of Counsel to speak out fearlessly, to denounce some person or the conduct of some person, and to use such strong terms as seem to him in his discretion to be appropriate to the occasion. From the point of view of the common law, it is right that the person attacked should have no remedy in the Courts. But from a point of view of a profession which seeks to maintain standards of decency and fairness, it is essential that the privilege and power of doing harm which it confers should not be abused. Otherwise grave and irreparable damage might be unjustifiably occasioned."

It is therefore of vital importance that all practitioners recognise and understand that the duty to act courteously extends not only towards fellow practitioners but also to clients and third parties.

The OLSC through a consultative process with the other State and Territories in Australia has sought to address the obligation of courtesy and has produced a comprehensive paper recommending that regulators take a firmer view of discourteous or offensive behaviour by practitioners toward fellow practitioners as well as clients or third parties. It appears that our interstate colleagues support our position. A copy of the paper is avilable on the OLSC's website at www.olsc.nsw.gov.au

[3] Opening of Law Term Dinner, 2006, address by The Honourable J J Spigelman AC, Chief Justice of New South Wales to the Annual Opening of Law Term Dinner of the Law Society of New South Wales, Sydney, 30 January 2006.

INTERNAL TRAINING – THE BENEFITS OF STAFF TRAINING

Recently staff at the OLSC undertook an internal training program focusing on mediation and communication in the workplace. Internal training is a regular activity at the OLSC and enables our staff to increase their competence in key areas of importance.

The mediation and communication workshops provided staff with the opportunity to improve their mediation skills; enhance their communication and negotiation skills and ensure they understand the needs of the parties in the resolution of disputes at the OLSC. By the end of the course the staff were able to conduct a complex mediation and apply a range of methods to resolve disputes.

The benefits of staff training cannot be disputed. In addition to broadening one's knowledge base, training can also provide an effective forum for open communication and better workplace morale. I encourage all law firms to continue their training programs.

NATIONAL CONTINUING PROFESSIONAL DEVELOPMENT GUIDELINES

In previous issues of Without Prejudice I have documented the move in Australia toward a national legal profession. The National Legal Profession Model Laws Project culminated for New South Wales with the passing of the *Legal Profession Act 2004* in October 2005. Following the move toward harmonisation I have been working together with the other State and Territory regulators to harmonise other aspects of the legal profession such as the multiple CPD schemes that presently exist across Australia.

A National CPD Taskforce of which I am a member was formed in November 2005 at the Annual Conference of Regulatory Officers (CORO) in Adelaide to consider whether national guidelines should be developed to identify areas where harmonisation of the various schemes might be achieved. The Taskforce agreed that it was necessary to minimise the differences between schemes where ever possible, not only for consistency with the spirit of national reform but also because of the real hardships, costs and inconveniences that flow from the differences between the schemes.

In August 2006 the Taskforce produced a draft set of CPD Guidelines. The Guidelines were presented and discussed at last November's CORO Conference in Sydney and they have now been sent to all of the Bar Associations and Law Societies in Australia for comment and hopefully implementation.

ANNUAL REPORT

The OLSC's annual report was tabled in Parliament in November last year. It is available in hard copy from the OLSC or online at www.lawlink.nsw.gov.au/olsc

COMING UP

In the next edition of *Without Prejudice* I will be discussing the increasing move towards incorporated legal practices and how the OLSC is further developing the self-assessment scheme to assist practices in complying with their obligation to implement and maintain appropriate management systems.

WITHOUT PREJUDICE VIA EMAIL

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